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BOARD OF COUNTY COMMISSIONERS PUBLIC HEARING

February 12, 2012

Consideration to Adopt an Amendment to the Elbert County Zoning Regulations: Part II, Section 27: Administrative Review and MOU Process for Minor Oil and Gas Operations and Related Facilities

STAFF REPORT
Staff: Kyle Fenner, Director – Community and Development Services

Summary: This public hearing is being heard by the Board of County Commissioners for adoption of an amendment titled Part II, Section 27: Administrative Review and MOU Process for Minor Oil and Gas Operations and Related Facilities the Elbert County Zoning Regulations to create an administrative review permitting process for oil and gas operations in Elbert County.

Background Information: On July 10, 2013 the Board of County Commissioners made and carried the following motion:

> Commissioner Schlegel moved that the BOCC direct County Staff to develop an alternative process to the Use by Special Review for the permitting of oil & gas facilities, to include a process for entering into a Memorandum of Understanding (MOU) and administrative use by special review.
>
> Commissioner Rowland seconded the motion.

Staff, acting as directed, set about to complete this task – to develop a process, alternative to the Special Use by Review that currently exists for oil and gas land use applications.

Staff has worked very hard to use words using their plain meaning. When someone asks a court to interpret a regulation, the first thing the judge does is read the regulation. If the language is clear on its face and there is no reasonable doubt as to its meaning, then the judge will simply apply the language of the regulation to the case at hand. This is known as the **"Plain Meaning Rule."** The judge will decipher the **plain meaning** of a regulation by applying the ordinary, everyday definitions of the statute's words, unless the statute itself provides specific definitions of the words. Colorado actually has a statute, section 2-4-101, C.R.S., that supports the **Plain**

Meaning Rule.

Through consultation with the COGCC, industry members, Planning Commission members and citizens, reviewing previous Elbert County drafts, and researching oil and gas related policies of other Colorado counties this administrative process was developed.

What Can the County Regulate?

I am going to read you a cheesy television analogy to illustrate what the County can and cannot regulate, where oil and gas is concerned. I borrowed this from attorney Jennifer Berman who is on the Office of Legislative Legal services team. She was flattered and asked me to let everyone know they have some great articles on the LegiSource Blog that make some legislative topics easier to understand. This story is a little bit silly but for what might be the first time – it is an example that can clarify the idea of operational conflict, preemption and why the County cannot write regulate oil and gas activity in any manner the County wishes no matter how appealing it might sound.

So let me tell you this story.

It's a beautiful Saturday in Brooklyn and Clair Huxtable (Clair represents the State of Colorado) has told her son, Theo (he's the oil and gas operation), that he can go out that night, but only if he spends the day taking his sister Rudy to the park. As Theo's parent, Clair has the authority to impose this condition on him. Likewise, the state, under the Oil and Gas Conservation Act, has the authority to impose conditions on oil and gas operations. See section 34-60-101, C.R.S. et seq. The state exercises its authority through regulations promulgated by the Colorado Oil and Gas Conservation Commission (COGCC) created in section 34-60-104, C.R.S.

Now, in classic 1980′s sitcom fashion, Theo has separately asked his dad, Cliff (Cliff represents Elbert County), if he can go out that night in hopes that Cliff will say yes with zero conditions attached. Cliff responds that Theo can go out that night, but only if Theo stays home all day to clean the house. Like Clair (the State), Cliff (the County) has the authority to impose this condition on Theo. Like Cliff, local governments may regulate oil and gas operations, and they do it through: (1) their authority to regulate land use under section 29-20-104, C.R.S.; (2) their zoning authority set forth in part 1 of article 28 of title 30, C.R.S., (county planning and building codes) and part 2 of article 23 of title 31, C.R.S., (municipal planning and zoning); and (3) their permitting authority ("1041" authority) under part 1 of article 65.1 of title 24, C.R.S.

And, now, back to our show. What is Theo (the Oil and Gas Operator) to do?

He can't abide by both Clair's and Cliff's conditions because their conditions conflict with one another – he just can't do both! Whose condition controls?

Let's recall that Clair is the state in this analogy, so she has the power to preempt Cliff (who is still the County) from regulating Theo. The preemption doctrine establishes a priority between potentially conflicting laws enacted by various levels of government. Bd. of County Comm'rs v. Bowen/Edwards, 830 P.2d 1045, 1055 (Colo. 1992). There are three categories of preemption:

express preemption, implied preemption, and preemption by operational conflict. Thus, there are three ways in which Clair could override Cliff's condition:

- First, Clair could state that she prohibits Cliff from exercising any authority over Theo. This would be express preemption, and, in the context of the state and local government, it would involve a state statute expressly providing that local governments shall not regulate a specific matter.

- Second, it could be determined that Clair intends to occupy completely a certain field of control over Theo (like, how he spends his Saturdays) by reason of having a dominant interest over Cliff's interest in that field. This would be implied preemption and it exists where the respective interests of various levels of government are "irreconcilably in conflict, as to eliminate by necessary implication any prospect for a harmonious application of both regulatory schemes." Bowen/Edwards, 830 P.2d at 1058.

- Third, with respect to the specific conditions imposed on Theo, a judge (perhaps Judge Harry Stone from Night Court) could determine that Cliff's condition conflicts with Clair's condition to such an extent that Cliff's condition "would materially impede or destroy" Clair's interest, which would mean that Cliff's condition is in operational conflict with Clair's condition. Bowen/Edwards, 830 P.2d at 1059 ("State preemption by reason of operational conflict can arise where the effectuation of a local interest would materially impede or destroy the state interest.").

In our scenario, Clair did not expressly prohibit Cliff from exercising authority over Theo, and her general interest in getting Theo to babysit his sister is not patently dominant over Cliff's interest in getting Theo to clean the house. Therefore, Clair has neither expressly nor impliedly preempted Cliff's condition. But Cliff's condition, which would keep Theo at home all day, is in operational conflict with Clair's interest in having Theo take Rudy to the park. Thus, Judge Stone would likely determine that Clair's, who is the State, condition preempts Cliff's (or the County's) condition through operational conflict.

Sorry, Cliff.

Case law

In Bowen/Edwards, the Colorado Supreme Court determined that the state has not expressly or impliedly preempted local governments from regulating oil and gas operations. But the court recognized that some local governments' oil and gas regulations may be in operational conflict with the state's interest in "[f]oster[ing] the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources." Courts must make this determination on a case-by-case basis. In Voss v. Lundvall Bros., 830 P.2d 1061 (Colo. 1992), the court determined that even a home-rule city's ordinance may be subject to preemption by operational conflict with regard to oil and gas regulation. The court held that the state's interest in oil and gas production preempted Greeley's ordinance completely banning all oil and gas drilling within its city limits.

In Town of Frederick v. North American Resources Co. (NARCO), 60 P.3d 758, 765 (Colo. App. 2002), the Colorado Court of Appeals held that the Town of Frederick's technical conditions on well drilling, safety requirements, and setback, noise abatement, and visual impact provisions were all preempted on the basis of operational conflict. But the court held that the town's requirements for special use permits and inspection and application fees were not in operational conflict with state regulations. See also Bd of County Comm'rs v. BDS Int'l, LLC, 159 P.3d 773 (Colo. App. 2006) (county's ordinance was preempted by operational conflict with respect to provisions concerning fines, financial security, and access to oil and gas operators' records).

Guided by these cases, the Colorado Department of Local Affairs' Division of Local Government has developed a list of regulations likely to be found in operational conflict with state law, including: (1) technical requirements; (2) setback requirements greater than those imposed by the COGCC; (3) fines inconsistent with the Commission's fine schedule; (4) financial security requirements; (5) noise abatement requirements beyond those imposed by the state; and (6) visual resource requirements different from those required by the state.

Longmont Example

Under the land-use, zoning, and permitting authority vested in it by statute, the City of Longmont has recently updated its oil and gas regulations to keep up with new technology in hydraulic fracturing, or "fracking". Fracking involves pumping a mixture of water, sand, and chemicals deep underground to fracture bedrock and capture the fossil fuels released from the process.
While drafting the ordinance, Longmont received a letter from the Colorado Attorney General, on behalf of the COGCC, requesting that the city "reject the draft regulations as being in operational conflict with the [Commission's] regulatory regime." Despite the letter, Longmont passed the ordinance imposing oil and gas regulations on July 17, 2012. Two weeks later, the COGCC sued Longmont, seeking a declaratory judgment invalidating portions of the ordinance as preempted by state law.

In its complaint, the COGCC argues that the following provisions of the Longmont ordinance are in operational conflict with the Commission's own regulations pertaining to:

- Technical conditions concerning drilling and well sites;
- A per se ban on surface operations and facilities in residentially zoned districts;
- Water sampling requirements beyond those required by the Commission;
- Riparian setbacks to protect water resources; and
- Wildlife habitat and species protection provisions.

Anticipating challenges based on operational conflict, Longmont included in the ordinance an "operational conflicts special exception" provision. That provision provides that oil and gas operations may be exempted from provisions of the ordinance if the city determines that those provisions are in operational conflict with the state regulatory scheme. In its complaint, the Commission argues that the special exception provision does not save the ordinance from preemption because it improperly grants the city the authority to make an operational conflict determination and it allows the city the discretion not to grant an exemption even if the city

determines that an operational conflict exists. Staff and the Planning Commission is recommending the removal of all Operational Conflict Language – we will cover this later.

Because there is substantial case law, we get an understanding of the State's limits and tolerances where operational conflict is involved. Staff drafted this amendment to the Elbert County Zoning Regulations with the following in mind: support responsible, balanced development, production, and utilization of the natural resources of oil and gas in Elbert County in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources and in a manner that avoids or reduces operational conflict with, and therefore preemption by, the State of Colorado. Yesterday we heard from Jake Matter, the Assistant State's Attorney General, through Nancy Prince at the COGCC that "the rule is good overall."

The Process

The Planning Commission held 5 work sessions that dealt with nothing but the document being considered today. The first of these sessions was held in Simla on October 24, 2013. Additional works sessions were held on November 21st, December 5th, December 12th and December 19th. I sincerely want to express my gratitude to the planning commission for being so committed and for maintaining such a rigorous meeting schedule.

At the November 21st meeting the citizens present were polled on what their three "top issues" were where oil and gas in Elbert County is concerned. They submitted those issues on pieces of paper and they were compiled into a spreadsheet by staff. Seventy-four pieces of paper, each with a single issue on it were submitted. Of those 74 issues, 31 were centered on following top three topics of concern:

TOP THREE CONCERNS

Rank	Concern	
1st	No Produced Water on the Roads	16
2nd	No Open Pits/Closed Loop Required	15
3rd	Protect Water	6

In part, the third most stated topic of concern can be supported by carrying out numbers 1 and 2. These concerns are not directly addressed in the proposed amendment to the Elbert County Zoning Regulations as they would be in direct conflict with State Oil and Gas Regulation. However, they **can** be addressed in the accompanying Memorandum of Understanding.

Specific Changes as Reviewed by the County Attorney and the Planning Commission: Staff met with the County Attorney on a great number of occasions and had him review and re-review the document. Most recently again the first week of February 2014 just to again fully review the

document and fully review the recommendations send forward by the Planning Commission. The document was also reviewed by Jake Matter, Colorado Assistant State's Attorney General. Along the way changes were made to the document based on the feedback we received from both attorneys. These changes were fully discussed in Planning Commission work sessions.

Review and Recommendation Procedure directly from the Elbert County Zoning Regulations: Part I, Section 2.

1. The Planning Commission shall review responses from referral agencies, staff comments and recommendations and the proposal submitted by the applicant on planning or zoning matters and recommend one of the following:

    a. Approval of the proposal without conditions.
    b. Conditional approval of the proposal indicating for the record what conditions.
    c. Denial of the proposal indicating for the record the reason(s) for the recommendation of denial.
    d. Continuing the request until further regularly scheduled meeting in order to obtain more information and help clarify the request before the.

The planning commission recommends that the BOCC do one of these four things.

Planning Commission Action: On January 2, 2014 the Planning Commission voted unanimously to recommend that the BOCC "Conditionally Approve Part II, Section 27: Administrative Review and MOU Process for Minor Oil and Gas Operations and Related Facilities. The conditions for BOCC approval as recommended by the Planning Commission are included as **Exhibit A.**

The Planning Commission recommendations are numbered 1 through 18. Recommendation #17 was deleted by the Planning Commission in the meeting but the Commission wanted to retain a record of that deletion so it is included on this list.

STAFF READING OF EXHIBIT A: exactly as recommended by the Planning Commission.

Staff Recommendation and Proposed Conditions of Adoption:

The first staff recommendations to be addressed before are the simple and straightforward ones. Staff recommendations are as follows:

PC Numbers: 1, 2, 3, 6, 12, 13, 14, 15 and 16: staff recommends that the BOCC accept planning commission recommendations**.**

PC Number 14: was already incorporated during the Planning Commission meeting on the meeting break and therefore needs no change as it has already been made. It is only mentioned for tracking.

PC Number 17: This was deleted and only mentioned for tracking.

PC Number 7: Staff Comments: Planning Commission recommendation unnecessary and redundant.

The third sentence of Section 27.4 already states **"no MOU shall be effective unless approved by the BOCC."**

Staff recommends that there be no changes made to the document and that the original language is retained and nothing be added here.

PC Number 18: Staff recommends that "flowback" water not be defined in the document. A thorough search turned up no official definition of the term made by a source we could refrence. Making up an industry definition when the industry has not already done so is not something staff is comfortable doing. It is a descriptive term and therefore self-defining when used in industry context.

Staff Number 1 - SECTION 27.10 PERFORMANCE STANDARDS FOR ALL OIL AND GAS FACILITIES

> **Currently reads:** Oil and Gas Facilities in Elbert County shall comply with the following performance standards in addition to those set forth in **the** MOU:
>
> Delete "the" and replace with "any applicable" so the sentence reads:
>
> **Staff Recommend:** Oil and Gas Facilities in Elbert County shall comply with the following performance standards in addition to those set forth in ***any applicable*** MOU:

Staff Number 2 - SECTION 27.12,B,2 OVER THE COUNTER PERMITS

> **Currently Reads:** A copy of the new Form 2 and, if required by COGCC, the new From 2A and Mechanical Integrity Test results (MITs);
>
> Because MITS are not always required by the state, staff recommends the addition of the words "if any" following (MITs).
>
> **Staff Recommend:** A copy of the new Form 2 and, if required by COGCC, the new From 2A and Mechanical Integrity Test results (MITs) *if any*;

Now we will address the more complex recommendations from the Planning Commission.

PC Number 4: Staff is partially in concurrence with the Planning Commission. It is clear that the County does not favor a lackadaisical approach to repairs of a damaged facility. It should also not be left to the 11th month to begin repairs. In general, it is in everyone's best interest to get repairs made in a proficient manner.

However, should another act of God interfere with construction (tornado, fire, hail, flood), a valid shortage of materials, a labor strike or should the repairs be nearly complete when the 12-month period expires, it seems reasonable that the BOCC have the flexibility to extend the period should there be good cause shown. From time to time, CDS gets requests for extensions to building permits and grants them with an extension fee. The BOCC recently extended the permit period for the Sylvester well project. This flexibility would mirror other flexibilities that the County offers with some regularity.

Staff concurs with the planning commission's change of "may" to "shall" but with the addition of a sentence at the end pf the paragraph that reads the following: *"*

However, an extension to complete the restoration beyond the 12 month period may be requested through CDS and subject to BOCC approval."

PC Number 5: The intent of the Planning Commission recommendation is clear and makes good sense. This administrative process should not be made available to just any applicant. The construct of Section 27 defines, with deliberation, what elements and characteristics constitutes which are Major facilities and which are a Minor facilities. In most cases clear definitions work and in other cases they tie the hands of regulators when flexibility would benefit the County. If an application were to come in for a minor but that minor had a single, insignificant (relative to what it could be) characteristic about it that forced it to be defined as a major, the County, without this flexibility would be forced to handle it as a Major even when it made no sense.

An example of the use of this flexibility is well illustrated by the pipeline project that came through Elbert County in 2013. The actual project was complete in less than half the time it took the Special Use by Review to be complete. SUR applications are resource-intensive to the County and the tax payer. To be able to expedite applications when it makes sound sense for everyone involved is highly desirable. In some cases a project, like a pipeline, will require a 1041 permit even though it is allowed to use the administrative process for an Elbert County Oil and Gas Permit.

Another example: Currently any facility that desires to recycle water onsite for re-use for additional hydraulic fracturing project. By definition all water recycling or re-use defines an application as a major. Technology is changing in this realm quickly and there are portable, closed units that are capable of doing on-site water recycling. It is in the County's best interest to not only allow this to happen but to encourage it.

A list of criteria to consider that are categorically items that are already regulated by the state begins to border on regulation of areas the County does not have the authority to regulate and while these items can and should be considered – listing them in this amendment is not something that staff recommends.

Staff recommends the following be inserted to replace all of Section 27.3B(2):

SECTION 27.3 (B)(2)

Upon the written request by an Operator, a Major Facility application may be treated as a Minor Facility provided the proposed Major Facility impacts are of short duration and such impacts are quantifiable. An evaluation meeting shall be scheduled no later than ten (10) days following the County's receipt of the Operator's written request. Requests shall be submitted to CDS. The evaluation meeting is to include the Operator, CDS Director, County Engineer, County staff and other affected agencies. A written report following the evaluation meeting shall be prepared and submitted to the Board of County Commissioners for approval.

PC Number 8: An alternative to directly referencing a number, as in "Section 27", that could change in the future as other parts of the Elbert County Zoning Regulations are be amended over time, it is preferable that the word "Minor" be inserted in the first sentence of 27.6 between "subsequent" and "oil". The addition of the word minor achieve the same end as making clear that the MOU does NOT apply to other MAJOR facilities that an operator might have in the County.

"Once an MOU has been executed by the parties, the MOU shall apply to all subsequent ***minor*** *Oil and Gas Facilities of the Operator within Elbert County."*

PC Number 9: To clarify and achieve the same intent that the planning commission had and to maintain process consistency the following is recommended:

In paragraph 2 of 27.6 delete everything following the word "circumstances" in the first sentence so that the word circumstances is the last word followed by a period.

Retain the last sentence of paragraph 2, Section 27.6 and add language "submitted to CDS".

The 2nd paragraph of 27.6 should read:

"An executed MOU may be amended by the parties when there is a demonstrated need to accommodate site-specific circumstance. All amendments to an MOU must be submitted to and approved by the BOCC."

PC Number 10: Retain the sentence that the Planning Commission recommends striking but to achieve the same elimination of redundancy it is recommended the BOCC strike the first sentence of Section 27.6, paragraph 3 so that paragraph 3 reads:

"An amended MOU is for a specific project or location and does not invalidate or modify any other MOU executed by the operator. Requests to amend an approved MOU shall be presented to CDS for review by the BOCC at the earliest possible regularly scheduled BOCC meeting."

PC Number 11:

I. WAIVERS

The Planning Commission recommends deleting all of the section titled "J. WAIVERS".

Much of the language in this section was harvested from the 2013 version that the planning commission approved. It is unclear to staff why the planning commission recommends to strike it. Staff does recommend removing the CDS director as a grantor of waivers and instead recommends that all waiver requests be heard by the BOCC at the next available public hearing.

Staff recommends that the WAIVERS section read the following:

Retain all the original language except delete the words "or the CDS Director" in the first sentence and that the following sentence at the end of the paragraph:

"The BOCC will consider the waiver request at the next available scheduled public hearing date."

J. OPERATIONAL CONFLICT(S) WAIVERS

Currently Reads: Special exceptions to this Section may be granted where the requirements of this Section present an operational conflict with State Regulation.

The Planning Commission Recommends striking Operational Conflict(s) Waivers entirely. Both the State's Assistant Attorney General and the County Attorney agree with the Planning Commission. Staff is in concurrence with the Planning Commission.

Staff recommends deleting all of the "J. OPERATIONAL CONFLICT(S) WAVIER" language and re-lettering the following sections as appropriate based on this removal.

WITHDRAWAL OF AN APPLICATION becomes "J".

LOCAL GOVERNMENT DESIGNEE (LGD) becomes "K".

Oil & Gas Rulemaking Efforts: Regulation Numbers 3, 6, & 7

In conclusion, some may point out that we have not address air quality in either the amendment or the MOU. Staff communicated with both the COGCC and the CDPHE Air Quality Commission and they said that the language I had asked them to evaluate would be completely redundant within the next 60 days as all of it would be required by the state. There will be a hearing on February 19, 20, 21 and 22, 2014 (Continuation to February 23, 2014 if necessary) for anyone interested in learning more.

Upon the complete review of all Planning Commission Recommendations and Staff Recommendations it is Staff's recommendation that the BOCC adopt the findings enumerated herein.

Respectfully submitted,

Kyle Fenner
Director – Community & Development Services

Attachments: "Exhibit A" – PLANNING COMMISSION RECOMMENDATIONS FOR THE BOARD OF COUNTY COMMISSIONERS: Administrative Review and MOU Process for Minor Oil and Gas Operations and Related Facilities